In The

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION, CONSUMER FEDERATION OF CALIFORNIA, COMMON CAUSE OF CALIFORNIA, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,

Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF NATIONAL FUEL GAS DISTRIBUTION CORPORATION, THE BROOKLYN UNION GAS COMPANY, CENTRAL HUDSON GAS & ELECTRIC CORPORATION, AND ROCHESTER GAS AND ELECTRIC CORPORATION, AS *AMICI CURIAE*

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QUESTION PRESENTED

Do decisions of a state public utilities commission, which compel a privately-owned public utility to carry in its billing envelopes the messages of a third party, violate the First Amendment to the United States Constitution?

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No. 84-1044

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ple that, under the First Amendment, it is not the function of government to provide TURN the wherewithal to express its views. *See Rochester Gas & Electric Corp. v. Public Service Comm'n,* 51 N.Y.2d 823, 825 (1980), *appeal dismissed,* 450 U.S. 961 (1981). Moreover, the Commission's notion that the Constitution permits it to impair PGandE's rights to the use and control of its billing envelopes in order to enhance expression by an organization such as TURN is at odds with *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976), wherein the Court expressly rejected the government's attempt to "restrict the speech of some elements of our society in order to enhance the relative voice of others," and concluded that such an attempt is "wholly foreign to the First Amendment."[15]

[15] The State's appropriation of PGandE's billing envelopes for the aggrandizement of TURN, a private entity, also amounts to a taking of PGandE's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. As stated in *Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55, 80 (1937), "this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." That principle remains good law. *See Hawaii Housing Authority v. Midkiff,* 467 U.S. ____, 104 S.Ct. 2321 (1984). The taking issue was raised by National Fuel, *et al.,* as well as the other utilities, in *Consolidated Edison Co. v. Public Service Comm'n,* ____ Misc.2d ____ (Sup. Ct. Albany Co. April 10, 1985, Index No. 10762-84). Having decided in the utilities' favor on First Amendment grounds, the New York Supreme Court found it unnecessary to reach the taking issue. *See* pp. 2-3, *supra.*

Also, since, as explained at pages 5-9, *supra,* the billing envelope and the space inside it are PGandE's private property, there can be no "subsidy of utility speech"[16] or "misappropriation of an asset which belongs to the ratepayers," as the PUC contends. PUC Mot. to Dismiss 18. If the case were otherwise, then no commercial enterprise that sends bills to its customers would be immune from claims by those customers that they are being forced to "subsidize" the firm's speech and that it has "misappropriated" a customer-owned asset.

[16] The argument that utility speech is "subsidized" by ratepayers is specious. As explained above (pp. 6-7), PGandE's ratepayers pay for gas and electric *service;* they do not thereby acquire an interest in *property* used to render that service. To the extent that PGandE derives any economic benefit from its use of the billing envelope to convey its messages, that benefit derives exclusively from the Company's ownership of the envelope. Because PGandE's *shareholders* pay the cost of producing *Progress* (Juris. Statement 4), and the inclusion of *Progress* in the billing envelopes adds nothing to the postage cost ultimately borne by ratepayers, there is no incremental cost to ratepayers from such inclusion, *i.e.,* ratepayers pay no more for a mailing in which Progress is included than they would for one in which it is not. Under these facts, there can be no subsidy.

Based upon a "subsidy" rationale similar to that espoused by the PUC, the New York PSC sought to impose fifty percent of all mailing costs (including postage, envelopes, processing costs, and the cost of assembling and updating ratepayer mailing lists) on New York utilities whenever their bill inserts contain utility messages on controversial matters of public policy. The Appellate Division of the State Supreme Court, relying principally on Justice Blackmun's dissent in *Consolidated Edison, supra,* 447 U.S. 530, upheld, by a three-to-two majority, the PSC's cost allocation scheme. *Consolidated Edison Co. v. Public Service Comm'n,* 107 A.D.2d 73 (3d Dep't 1985). The case is currently on appeal to the New York Court of Appeals.

The PUC's stated "compelling interests" are nothing but assertions and pretexts. They fail utterly to meet the State's heavy burden of demonstrating an interest sufficiently compelling to override PGandE's First Amendment rights.

B. The PUC Has Failed To Demonstrate That Its Objectives Cannot Be Achieved By Narrower Means.

Even if the Court were to accept as "compelling" the PUC's asserted interests in forcing PGandE to open its billing envelopes to TURN, the Court must find that the Commission has failed to show that those interests could not be achieved by other means which do not infringe PGandE's First Amendment rights. *See Wooley, supra,* 430 U.S. at 716; *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). To the extent the State perceives expanded consumer representation as necessary, it can carry out that objective by providing funding for such representation — either through existing agencies, such as the Commission staff or the Attorney General, or through entirely new agencies.[17] Such alternative means would not infringe PGandE's First Amendment rights.

The fact that TURN can avoid paying any postage costs or that the State of California can avoid providing additional funding for representation of certain groups in PUC proceedings does not justify this envelope access scheme as opposed to a State-funded program. The Court has repeatedly made clear that fundamental constitutional rights are not to be restricted as a result of a state's fiscal condition or policies. *See Boddie v. Connecticut,* 401 U.S. 371 (1971) (state's interest in recouping court costs not sufficient to override fundamental right); *Schneider v. Irvington,* 308 U.S. 147 (1939) (burden on state caused by littering insufficient to uphold ban on distribution of pamphlets). *See also Buckley v. Valeo, supra,* 424 U.S. at 48-49. Thus, the fact that the State desires to achieve a goal by the least *expensive* means possible cannot override the constitutional requirement that, where First Amendment rights are concerned, the goal be accomplished by the least *restrictive* means possible.

[17] The New York State Consumer Protection Board is an example of such an agency. The Board, through its Executive Director, is specifically authorized to "initiate, intervene in, or participate in any proceedings before the [New York] public service commission . . . ." N.Y. Exec. Law § 553(2)(c) (McKinney 1982).

As explained at page 17, *supra,* in light of PGandE's ownership of the billing envelope and the space inside, the State's purported interest in eliminating a "subsidy" or "misappropriation" of a ratepayer-owned asset cannot withstand constitutional analysis. But even if, contrary to common sense and this Court's prior decisions (*see, e.g., Board of Public Utility Comm'rs, supra,* 271 U.S. at 32), there were such a "subsidy" or "misappropriation," it is difficult to see how allowing TURN to use PGandE's billing envelopes can be considered a solution to that problem. The connection is tenuous at best.

The PUC has certainly failed to suggest, much less demonstrate, that it could not achieve its goal through means less drastic than violating the Company's right of free expression by forcing it to carry TURN's messages. *See Wooley, supra,* 430 U.S. at 716. The Commission has utterly ignored this Court's admonition that regulation which affects vital First Amendment freedoms must be drawn with "precision." *Kusper v. Pontikes, supra,* 414 U.S. at 58-59.

C. The PUC Has Not Demonstrated That The Purpose Of Its Restriction Of PGandE's Right Of Free Speech Is Ideologically Neutral.

Assuming, *arguendo,* that the PUC were able to show both a sufficiently compelling interest and that it had adopted the least restrictive means available for fostering that interest, the Commission must still meet the third criterion of the *Wooley* test —

the requirement that the State purpose underlying the restriction be ideologically neutral. 430 U.S. at 717. This the PUC has not done — nor could it.

As a threshold matter, the offense to PGandE's First Amendment rights is not diminished by the fact that the State has not specifically dictated the message to be carried in the Company's billing envelopes. In *Miami Herald, supra,* 418 U.S. 241, the Court struck down a Florida statute affording political candidates equal space to reply to criticism by newspapers on the ground that such a right to reply intruded impermissibly into the newspaper's decisions with regard to the content of the paper. *Id.* at 258. The Court invalidated the law despite the fact that the State of Florida itself did not dictate the content of the replies.

In the instant case, however, the Commission has mandated access for TURN on the basis that it will represent a particular point of view — that of residential ratepayers — on utility matters. Dec. No. 83-12-047, App. to Juris. Statement 4a, 14a, 16a. For example, according to the Commission and TURN itself, TURN's positions in proceedings involving PGandE are characterized, *inter alia,* by "a desire to keep rate of return and evaluation of rate base relatively low." Dec. No. 83-12-047, App. to Juris. Statement 15a. Access by TURN to PGandE's billing envelopes is obviously designed to promote such a position at the expense of PGandE. In this respect, therefore, the PUC's decisions are even more offensive than the Florida statute invalidated in *Miami Herald, supra.*

This Court has regularly struck down government interference with the right of free expression where such action is based upon the identity or interest of the speaker. *See City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 176 (1976) (state cannot require school district to "discriminate between speakers on the basis of their employment or the content of their speech"); *Police Dep't of*

Chicago v. Mosley, 408 U.S. 92 (1972) (statute prohibiting all picketing except for purposes of labor dispute held to be unconstitutional content-based restriction). Moreover, the PUC cannot be permitted to do indirectly (by selecting a speaker with a known point of view) that which it cannot do directly (by requiring PGandE itself to state that point of view). *Speiser v. Randall, supra,* 357 U.S. at 526.

By intentionally fostering the views of TURN in opposition to those of PGandE, the PUC can make no pretense that its decisions are ideologically neutral as to their purpose. Accordingly, its action fails this element of the *Wooley* test as well.

D. The "Time, Place, And Manner" Doctrine Cannot Salvage The PUC's Action.

Because the PUC's decisions granting access to TURN are not ideologically neutral, the Commission may not, as it has attempted to do (PUC Mot. to Dismiss 17), justify its action as a "reasonable time, place, and manner" regulation, as described in *Consolidated Edison, supra,* 447 U.S. at 536. As the Court summarized, "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Ibid.* Even if the PUC's pretense of content-neutrality were correct, the Commission has ignored two other elements of the doctrine which render it inapposite to the present case.

First, as the above-quoted language in *Consolidated Edison* indicates, the doctrine is a negative one. It restricts, rather than creates, rights of free speech. The decisions relying upon the "time, place and manner" doctrine make clear that it comes into play when speech which would otherwise occur would impinge upon a competing "significant governmental interest." *Id.* at 535. *See also Regan v. Time, Inc.,* 468 U.S. ____, 104 S.Ct. 3262 (1984). Moreover, the fact that such regulation must "leave am-

ple alternative channels for communication" (*Consolidated Edison, supra,* at 535) underscores its restrictive nature. Obviously, the concept of leaving open "alternative channels" only makes sense in the context of *limitation* on a right, not *creation* of a right where none existed.

Second, the Commission ignores the fact that restrictions as to the time, place and manner of speech are dependent upon a substantial governmental interest in the orderliness of speech — *i.e.,* where the public may be significantly imposed upon as a result of the time at which the speech occurs, the location of the speech, or the physical characteristics of the speech. The Court's example of the "roving sound truck that blares at 2 a.m." in a neighborhood (*id.* at 536), epitomizes the purpose of, and limitations on, the "time, place and manner" doctrine. And the cases discussed in *Consolidated Edison* plainly demonstrate the focus of that doctrine on public places. *Id.* at 535-37. Accordingly, the "time, place, and manner" doctrine is inapplicable to the present case.

E. The *PruneYard* Decision Does Not Support The PUC's Action.

In their Motions to Dismiss, the appellees[18] insisted that the Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), precludes reliance upon *Wooley* as a basis for finding a violation of PGandE's freedoms of speech and association. PUC Mot. to Dismiss 23-24; TURN, *et al.,* Mot. to Dismiss 20-24.

In *PruneYard,* the owner of a shopping center sought to exclude from the center students who were soliciting signatures for a petition in opposition to a United Nations resolution. The California Supreme Court held that the State Constitution secured

[18] With the exception of the California Association of Utility Shareholders.

the right of the students to conduct that activity on the shopping center premises and that such interpretation of the California Constitution did not infringe the owner's property rights under the United States Constitution. *Robins v. PruneYard Shopping Center,* 23 Cal. 3d 899 (1979). This Court affirmed, concluding, *inter alia,* that the First Amendment free speech rights of the owner had not been impaired in that (a) the shopping center was open to the public and thus there was little likelihood of the students' message being confused with the views of the owner, (b) there was no governmental prescription of the message being displayed and thus no opportunity for governmental discrimination in favor of or against a particular point of view, (c) the owner could expressly disavow the message by posting signs, and (d) the owner was not compelled to affirm a belief in any governmentally-prescribed position or view. *PruneYard, supra,* 447 U.S. at 87-88.

In their insistence that the *PruneYard* analysis overrides the *Wooley* decision, the appellees overlook the fact that the above-mentioned four factors were identified by the Court as bases for *distinguishing* the *PruneYard* facts from those of *Wooley,* not as a generic substitute for the *Wooley* test.[19] As we explained at pages 14-21, *supra,* the PUC's action clearly fails to meet any of the three criteria identified in *Wooley* in order to pass constitutional muster.[20] Nevertheless, we shall comment briefly on the appellees' arguments that *Wooley* is distinguishable on the bases cited in *PruneYard.*

[19] The Court specifically referred to them as "distinguishing factors." 447 U.S. at 87.

[20] *I.e.,* the Commission's action would have to satisfy each of the following criteria: (1) the State's interest must be sufficiently compelling to warrant the action; (2) the State's objective cannot be achieved by narrower means; and (3) the purpose of the restriction must be ideologically neutral. 430 U.S. at 716-17.

The appellees argued that "there is no danger that the views of TURN will be misidentified as those of PG&E" because the PUC has required that "each insert 'clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or [the] Commission.' " TURN, *et al.*, Mot. to Dismiss 21 (*quoting* Dec. No. 83-12-047, App. to Juris. Statement 32a); *see* PUC Mot. to Dismiss 24. The requirement of such a disclaimer does not, of course, assure that it will be effective — particularly since TURN's messages will arrive at the customer's mailbox in an envelope bearing PGandE's name accompanied by a bill from the Company. Aside from that fact, however, the appellees overlook the vast differences between a 21-acre shopping center to which the public is invited (447 U.S. at 77) and PGandE's billing envelopes in which the public has never been invited to include its messages. The *Prune Yard* decision pointed to the public character of the shopping center as minimizing the danger of confusion among views. *Id.* at 87. But underlying the Court's entire opinion is the recognition that it was "dealing with the public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner." *Id.* at 95 (White, J., concurring). *See also id.* at 90 (Marshall, J., concurring) (shopping centers are open "to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and

parks").[21] Thus, the factual distinction between the very public character of a shopping center — which the Court took pains to point out (*id.* at 77-78, 83) — and the private character of PGandE's billing envelopes cannot be lightly ignored.

The appellees also claim that, "as in *Prune Yard,* the state has dictated no specific message, and thus there is 'no danger of governmental discrimination for or against a particular message.' " TURN, *et al.*, Mot. to Dismiss 21 (*quoting Prune Yard, supra,* at 87). *See* PUC Mot. to Dismiss 23. We disposed of the notion that the Commission's action is content-neutral in our discussion at pages 19-21, *supra,* wherein we pointed out that the Commission has selected TURN as the sender of the message with full knowledge that the message will be opposed to PGandE's fundamental interests.[22] Equally important, because TURN had to obtain PUC approval to gain access to PGandE's billing envelopes, and will have to seek renewal of such approval when the initial two-

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[21] The extent to which shopping centers have become an essential part of the daily lives of much of the population and have "replaced" center-city streets, sidewalks and parks as First Amendment forums is detailed in the opinion of the California Supreme Court. *Robins v. Prune Yard Shopping Center, supra,* 23 Cal. 3d at 907-08. In view of the fact that "[t]he retail mall and shopping center serves much the same public functions as Main Street and the public square," Professor Cox read this Court's decision in *Prune Yard,* not as creating a broad new right of third parties to use a privately-owned shopping center for expression, but rather as "accommodating the law of trespass to modern conditions." Cox, *The Supreme Court, 1979 Term: Foreword: Freedom of Expression in the Burger Court,* 94 Harv. L. Rev. 1, 48 (1980).

[22] The fact that these messages attack PGandE directly and specifically is an important factor not present in *Prune Yard* where the speech involved had no specific relationship to the shopping center's or its owner's interests. *See* 447 U.S. at 99-100 (Powell, J., concurring). This same factor also makes the instant case even more compelling than *Wooley,* in that the New Hampshire State motto, while contrary to the views of the Maynards, did not attack them or their religion directly.

year term expires (Dec. No. 83-12-047, App. to Juris. Statement 32a), the Commission's ability to exert influence over the content of TURN's messages is clear. Accordingly, the appellees' suggestion that the PUC's access requirement fits within the facts of *Prune Yard* because it is content-neutral is pure fiction.[23]

The appellees further claim that PGandE, like the shopping center owner in *Prune Yard,* is free to disavow any apparent connection to, or support of, the messages of TURN in its billing envelopes. TURN, *et al.,* Mot. to Dismiss 21; PUC Mot. to Dismiss 23. Since the appellees' claim is stated in the most conclusory terms, we will not belabor the point by speculating as to how PGandE is expected to disavow TURN messages. Although the opinion in *Prune Yard* suggested that the shopping center owner could post signs to indicate his disagreement with the petitioning activity occurring on the premises (447 U.S. at 87), that suggestion must be viewed in the context of the nature of the shopping center, as a place to which the owner had invited the public, and the California Constitution's guarantee of the public's right to engage in the conduct objected to by the owner.[24] The instant case is factually much closer to *Wooley,* in which the Court rejected the suggestion of the dissenting Justices that "appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live

[23] Furthermore, even if the PUC's access requirement were content-neutral, the holding in *Prune Yard* would not support the Commission's actions. In *Prune Yard,* this Court did not transfer the control of private property to the government; rather, it merely recognized a limited right of access to such property where the owner has invited public use. In fact, Justice Rehnquist noted that the property owner, not the government, was free to adopt reasonable "time, place and manner" restrictions on third-party access. 447 U.S. at 83-84. The PUC's decisions, therefore, extend far beyond the *Prune Yard* holding by transferring control of private property to the PUC and TURN and by denying PGandE the right to decide when and how its property will be used. *See* note 15, *supra.*

[24] *See also* note 21, *supra.*

Free or Die' and that they violently disagree with the connotations of that motto." 430 U.S. at 722 (Rehnquist, J., dissenting). Accordingly, where the property involved is not open to the public and does not fulfill the function of a traditional public forum, there can be little basis for the notion that the ability to disclaim a message — even by expending minimal effort — cures a violation of the right not to speak or to support another's message.[25]

That is particularly so in this case where, unlike in *Wooley* and *Prune Yard,* the speech at issue directly attacks PGandE. It may be one thing to expect a shopping center owner to post a sign disavowing any association with the expression of views on a matter before the United Nations which does not have even the remotest connection with the enterprise. But it is quite another to say that PGandE's rights of self-expression and association can be safeguarded with a similar one-line disavowal where the messages at issue amount to a direct attack on the Company.[26]

In sum, the *Prune Yard* holding is inapplicable to the present facts. The Court's opinion in *Wooley* is controlling and mandates reversal of the decision below.

[25] *See West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943). The Court implicitly rejected Justice Frankfurter's suggestion that the State could compel school children to salute the flag where both the children and their parents were free to disavow the meaning attached to the salute. *Id.* at 664 (Frankfurter, J., dissenting). As Justice Powell aptly noted in his concurring opinion in *Prune Yard,* the opportunity to disavow compelled speech can never restore the " 'right to refrain from speaking at all.' " 447 U.S. at 99 (Powell, J., concurring; citation omitted).

[26] *See Prune Yard, supra,* 447 U.S. at 99-100 (Powell, J., concurring) (noting examples where speech may "virtually compel" response).

CONCLUSION

As the foregoing discussion demonstrates, the State of California's requirement that PGandE open its privately-owned billing envelopes to TURN strikes at the very heart of the Company's right, under the First Amendment, to use its property to communicate with customers and to refrain from using that property to convey and become associated with messages which it finds offensive and contrary to its own views.

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

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